

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 4100 of 1997

For Approval and Signature:

Hon'ble MR.JUSTICE R.K.ABICHANDANI

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

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HEM PLAST HEALTH CARE PVT LTD.

Versus

STATE OF GUJARAT

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Appearance:

MR RAVINDRA SHAH for Petitioner

MR. UA TRIVEDI, AGP for Respondent No. 1 & 2

TANNA ASSOCIATES, ADVOCATES, for respondent Nos. 3 to

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CORAM : MR.JUSTICE R.K.ABICHANDANI

Date of decision: 13/08/97

ORAL JUDGEMENT

The petitioner challenges the award of rate contract by the respondent No. 2 to the respondents Nos. 3 to 6 on the footing that he has been arbitrarily denied to participate by offering F(II) quality bandage cloth and absorbent gauze.

The case of the petitioner is that F(II) quality of absorbent gauze and bandage cloth has been prescribed under Rule 124-C of the Drugs and Cosmetics Rules, 1945 in Schedule F(II) thereof and these goods offered by the petitioner were of the standards so prescribed and therefore the petitioner could not have been prevented from participating as a tenderer on the ground that the petitioner's goods do not have ISI mark certification more particularly since the tender notice never prescribed the requirement that the goods should be of ISI mark. The case of the petitioner is that the standards prescribed for the surgical dressings under the Drugs and Cosmetics Rules and the Indian Standard prescribed under Bureau of Indian Standards Act, 1986 hardly had any difference, and, they were almost identical except in case of 'pH factor' for which the limits were indicated in the standards prescribed under the Bureau of Indian Standards Act while there was no reference to it in the Standards prescribed in Schedule F(II) of under Rule 124-C of the Drugs and Cosmetics Rules.

The learned counsel for the petitioner contended that the requirement of ISI mark was not mentioned in the tender notice and was beyond its scope. Therefore, the respondent authorities could not have insisted on that requirement and denied the tender form to the petitioner on that ground. It was contended that the petitioner had approached the respondent No. 2 on 17.5.1997, as stated in the petition, but was not given the tender form on the ground that the petitioner was not in a position to supply the goods bearing ISI mark. According to the learned counsel for the petitioner, under the provision of BIS Act, it was not mandatory for the dealer to have BIS specification in respect of its goods unless a notification was issued under Section 14 of that Act. It was further argued that pH value in context of surgical dressings like bandages and absorbent gauze is of no consequence and since there is no provision under the Drugs and Cosmetics Rules prescribing the standard of pH value that requirement ought to have been ignored. It was pointed out that in the communication sent to the petitioner in a different context namely in response to the letter of the petitioner regarding ISI licence for Disposable Hypodermic syringes, the Bureau of Indian Standards had replied on 19.9.1996 as per copy at Annexure-'D' to the petition informing the petitioner that the said product of syringes was not amenable for certification as the product comes under the Drugs Act. Relying on this letter it was contended that if the provisions of the Drugs Act were attracted there was no

question of complying with the Standards of Bureau of Indian Standards and ISI certificate was not required in such cases. It was further contended that at one point of time on 3.5.1997 a communication was sent by the Government to the hospitals and the Medical Authorities by which they were asked to make purchase of absorbent gauze/cotton wool which satisfied the Indian pharmacopeia standards and it was not necessary for insisting on ISI standards. It was submitted that this conduct indicated that at one point of time even the Government took note of the fact that there was hardly any difference in the standards prescribed under the Drugs Act and under the BIS Act in respect of these goods. In support of his contention that the respondent authorities could not have gone beyond what was stated in the tender notice the learned counsel relied on the decision of Hon'ble the Supreme Court in Dutta Associates Pvt. Ltd. Vs. Indo Merchandiles Pvt. Ltd. & Ors. reported in JT 1996(1) S.C. 419. In that decision Hon'ble the Supreme Court held that whatever procedure the Government proposes to follow in accepting the tender must be clearly stated in the tender notice and that the consideration of the tenders received and the procedure to be followed in the matter of acceptance of a tender should be transparent, fair and open.

The tender notice was issued by the Central Medical Stores Organization of the Government on 15.5.1997 and from a copy thereof which it at Annexure-'N' to the petition it appears that the tenders were invited by the Directorate for the four items mentioned in that notice including the two items of absorbent gauze and bandage cloth and the interested parties were requested to contact the office during working hours for getting the priced tender form. The particulars regarding the date of issuance, last date for submission, and opening of tenders were indicated in that notice. Thus, as per the tender notice interested parties were requested to contact the office for getting the tender form.

There were no terms and conditions indicated in the tender notice but from the tender form it is clear that the terms and conditions were mentioned therein. As per the condition No. 5, as regards absorbent gauze and bandage cloth it was specifically stated that offers of only ISI mark would be considered. This fact was also detailed in the specification sheet in the tender form and as regards absorbent gauze there is reference to ISI mark IS-758-1988 and as regards the bandage cloth there is a reference to ISI mark i.e. IS-863-1988 both for

handloom cotton gauze (absorbent) and bandage cloth non-sterilized. Admittedly the petitioner did not want to offer ISI mark goods but he wanted to offer absorbent gauze and bandage cloth which according to him were in conformity with the standards prescribed in Schedule F(II) of the Drugs and Cosmetics Rules. Therefore, as per this tender condition the petitioner was not qualified to offer because only ISI mark offers were to be considered. Reliance of the petitioner on the Circular dated 3.5.1997 can hardly help the petitioner because that circular was cancelled from its inception by subsequent letter dated 14.5.1997 by the Government, a copy of which is at Annexure-'M' to the petition by which the Medical Authorities and hospitals were specifically informed that ISI standard should be observed in making purchase of absorbent gauze and bandage cotton wool etc. Even by Circular dated 1.3.1989, a copy of which is at Annexure-'I' the Government impressed upon all the concerned that its policy was to make purchases of such goods which bear ISI mark.

In the affidavit in reply of the respondent No. 2 it is stated that these gauzes and bandage clothes are used in large quantity in Government hospitals, primary health centres and that it is a general policy of the Government that as far as possible ISI mark items should be purchased and that policy has been followed in the present case. It is stated that the ISI standard is insisted in the interest of patients at large. The suggestion of the petitioner that there is no difference between ISI mark and F(II) quality as regards gauze and bandages is denied. It is stated that tenders were received in sealed covers by authorised persons and kept in a separate cupboard.

On comparison with the between prescribed in Schedule F(II) in respect of surgical dressings and particularly for gauze and bandages with the standard prescribed by the Bureau of Indian Standards, admittedly, there is an additional requirement in the standard prescribed by the Bureau of Indian Standards namely that the pH value of aqueous extract should be between 6.5 to 8.5 as per IS-1390-1983 cold method. This requirement is prescribed both for handloom cotton bandage cloth and handloom cotton absorbent gauze.

The question that arises is that if the petitioner's goods satisfy the standards laid down under the Schedule F(II) of the Drugs and Cosmetics Rules could it be said that the provisions of the Bureau of Indian Standards Act cannot be applied to these goods and certificate of ISI

mark cannot be insisted upon in respect of such goods which satisfy the standards prescribed under the Drugs and Cosmetics Rules. In this context it can be seen from the provisions of Section 40 of the Bureau of Indian Standards Act, 1986 that the provisions of that Act do not affect the operation of the Drugs and Cosmetics Act, 1940 or any other law for the time being in force which deals with standardisation or quality control of any article or process. The standards prescribed under BIS Act are therefore independent of the standards that may be required under other laws including laws under Drugs and Cosmetics Act, 1940 which continued to operate.

As regards, the standards under BIS Act, 1986, use of standard mark for an article would be compulsory only if under Section 14 thereof the Central Government, after consulting the Bureau has notified its opinion in the Official Gazette that any article or process of any Schedule of industry shall conform to the Indian Standards and directs use of standard mark under the licence as compulsory on such articles or process. In other words, for the notified article or process the Central Government in public interest can insist upon use of standard marks on them and insist that this should be compulsorily done under a licence. Therefore, cases which do not fall in Section 14 would still be there where the articles which are not so notified can be manufactured or sold without any ISI mark. Dealing in such articles where it is not compulsory to use standard mark would not be illegal so far that Act is concerned. However, if any other law including Drugs and Cosmetics Act requires such articles to comply with certain standards then those provisions will operate in view of the provisions of section 40 of the BIS Act.

In section 2 of the Drugs and Cosmetics Act, 1940 there is a clear provision that the provisions of the said Act are in addition to and not in derogation of any other law for the time being in force including the Dangerous Drugs Act, 1930. Thus, the Drugs Act is not an exhaustive legislation and therefore it cannot be said that if any goods are required to comply with the standards under the Rules framed under the Drugs Act, the standards which may also be prescribed in respect of such goods under BIS Act would not be applicable. Therefore, there is no scope for an argument that if the petitioner's absorbent gauze and bandage cloth comply with the standards under F(II) of the Drugs and Cosmetics Rules, the respondent authorities are not justified in insisting upon the standard under the BIS Act particularly in respect of pH value.

The question of purchase of goods of a particular standard or quality which bears ISI mark is a matter of policy for the Government to follow and in the instant case it is satisfactorily established on the record that the policy of the government was to go in for bandage cloth and absorbent gauze having ISI mark which ensured that additional standard of prescribed pH value was also complied in respect of the goods which may ultimately purchased.

The tender notice refers to the tenders which were required to be collected and the tender form clearly mentioning the condition that these goods must satisfy the ISI standards otherwise the offer would not be considered. The petitioner did not have any ISI mark goods offer. Therefore, he cannot make any grievance that his goods were not considered or that he was not given a tender form.

The action of the respondents can therefore not be said to be arbitrary or unjust. Therefore, there is no substance in this petition and it is rejected. Notice is discharged with no order as to costs. Interim relief is vacated.

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